78-1564

No. 79

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1979

ROBERT A. BEAUMONT,
Petitioner,

-vs-

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

REID, REID, MACKAY, EMERY &
DeVINE, P.C. WILLIAM L. MACKAY
Attorneys for Petitioner
Business Address:
715 Washington Square Building
Lansing, Michigan 48933
Telephone: [517] 435-4366

AMERICAN PRINTING COMPANY, 125 WEALTHY STREET, S.E.,
GRAND RAPIDS, MICHIGAN 49503 — PHONE (616) GL 8-5326

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An order, affirming the decision of the Michigan Civil Service Commission on the appeal of the petitioner to the Ingham County Circuit Court denying him relief, was entered on September 29, 1976. (Appendix A)

The opinion of the Michigan Court of Appeals was entered on June 7, 1978, affirming the decision of the Ingham County Circuit Court. (Appendix B)

An application for leave to appeal from the decision of the Michigan Court of Appeals was filed with the Michigan Supreme Court. The application for leave to appeal was denied on January 17, 1979. (Appendix C).

JURISDICTION

The decision of the Supreme Court of Michigan denying the application for leave to appeal was entered on January 17, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Was the petitioner, a Lt. Colonel in the United States Army Reserve, deprived of due process of law and the equal protection of the law, as guaranteed to him by Articles V and XIV of the Amendments to the United States Constitution, when he was fired from State employment by the Michigan Department of Labor upon his return from active duty on November 20, 1972, without a hearing before the Governor of the State of Michigan, as legislatively mandated by Act 205, 1897, the Veterans Preference in Employment Act, Act 263, 1951; and in violation of Rights of Public Employees Who Enter Armed Forces, M.S.A. 4.1221, et seq; and, Act 263, 1951, Rights of Public Employees Who Enter Armed Forces, M.S.A. 4.1486 (1) (3) et seq; and, Act 133, 1955, Military Leaves and Re-employment Protection, M.S.A. 1487 (1)?

2. Was the petitioner deprived of/the protection of Article V and XIV of the United States Constitution by the State Courts of Michigan which absolutely refused to adjudicate whether or not the petitioner was entitled to the protection of the Acts listed above in question number #1, especially in view of the fact that the petitioner was required to report for duty by a Federal order and was exonerated of any wrongdoing by the United States Army?

STATEMENT OF THE CASE

The petitioner was classified as a Labor Safety Supervisor 13 in the Safety and Regulation Division of the Michigan Department of Labor on November 20, 1972. He was discharged from that position upon returning from active duty as a Lt. Colonel in the United States Army Reserve. (Appendix B, pages 1, 2 and 3) At the time of his removal, it was the written policy of the State of Michigan in accordance with a document entitled, Statement of Support for the Guard and Reserves, to support petitioner while on duty with the United States Army and to cooperate with him in his State employment. (Appendix D, P).

The petitioner appealed his dismissal from State employment by requesting a hearing before a hearing examiner of the Michigan Civil Service Commission on January 31, 1973. Petitioner, in compliance with state law, contacted the legal advisor to the Governor and requested a hearing. He wrote a letter to the Governor requesting a hearing before the Governor of the State of Michigan, pursuant to the provisions of the Veterans Preference in Employment Act, M.S.A. 4.1221 et seq. (Appendix E, P) The request was denied by Barry Brown, the Director of the Department of Labor, stating that the State statutes alluded to by the petitioner did not apply to him, apparently, because he was a State Civil Service employee. (Appendix F, P) The Veterans Preference in Employment Act, Act 205, 1897, was in existence prior to the adoption of Article VI, Section 22 of the Michigan

Constitution of 1908. Civil Service was adopted on January 1, 1941, amending the Michigan Constitution, creating Civil Service.

At no time, although requested before the hearing examiner, the Michigan Civil Service Commission, a hearing referee appointed by the Department of Labor, the Ingham County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court, has a judicial body ruled why petitioner was not entitled to the protection of the Acts aforesaid. The courts have absolutely refused to discuss the matter although the petitioner has continuously raised the issue throughout the proceedings. (R 79 and Exhibit A, R 81 and R 88)

The three state statutes are as follows:

1. "*Rights of Public Employees Who Enter Armed Forces*", M.S.A. 4.1486(1), being Act 263 of 1951.

The pertinent language of the statutory enactment aforesaid is M.S.A. 4.1486 (4) which states:

> "Any public employee who holds a position in a public employment *shall be granted* a leave of absence for the purpose of being inducted or otherwise entering military duty. If not accepted for such duty, the employee shall be reinstated in his position without loss of seniority or status or reduction in his rate of pay".

The petitioner was a public employee. He entered the Armed Services for military duty, in accordance with orders that were submitted to him by the United States Government.

Further, M.S.A. 4.1486 (6) states:

> "Any laws or parts of laws, which are inconsistent with the provisions of this Act, or which would serve to defeat the purposes thereof, shall to such extent be deemed inapplicable to public employers and public employees in the exercise of the rights and privileges conferred by this Act".

This legislative enactment was intended to apply to public employees who enter the Armed Forces as set forth in the entitlement of the statute. The statute has never been repealed directly or by implication. No constitutional provision supersedes it. The statute aforesaid is legally vital in the State of Michigan protecting those persons who are public employees who enter the Armed Forces. The hearing officer stated:

> "The Hearing Officer finds no violation of the rights granted the employee under the Constitution of the laws of the State of Michigan or of the United States. It was not established by the evidence that the employee was discriminated against because of his service nor was he hindered or prevented from performing military service".

However, that is not the point. The point is, that the statutory language, M.S.A. 4.1486 (4), states that he *shall be granted* leave of absence for the purpose of being inducted or otherwise entering military duty. The statute was violated by the State Department of Labor because on November 20, 1972, without any prior warning, the petitioner was fired when he returned from military duty. A specific complaint lodged against the petitioner was that he was on military leave from October 24, 1972 through November 17, 1972, and, that he failed to notify his supervisor that he would be on military leave for that period of time. (Service Rating Report, DOL, Exhibit I) M.S.A. 4.1486 (3), states as follows:

> "Any person who is restored to a position, in accordance with the provisions of this act shall not be discharged from such position *without cause within one year after such restoration*. . ."

The petitioner did nothing wrong within the one year period *after* he returned from military duty because he was fired on the day of his return, that is, November 20, 1972.

The next state statute which applies is M.S.A. 4.1487 (1), entitled:

"Military Leaves and Re-employment Protection", (Act 133 of 1955, page 197 immediately effective June 7, 1955).

The dismissal of the petitioner occurred after 1955, that is, November 20, 1972. The petitioner was on military leave because that is the charge lodged against him as stated aforesaid. The statute reads as follows:

§4.1487 (1): *"Officers and enlisted men of military or Naval Forces; not to be discriminated against*

Section 1. No person shall discriminate against any officer or enlisted man of the military or naval forces of the state or of the United States because of his membership therein". (CL'48, §32.271)

§4.1487 (2): "Same; military forces of state, discharge of employee or dissuading him from enlistment or accepting commission.

Section 2. No employer or officer or agent of any corporation company or firm, or other person shall discharge any person from employment because of being or performing his duty as an officer or enlisted man of the military or naval forces of this state, or hinder or prevent him from performing any military service or from attending any military encampment or place of drill or instruction, he may be called upon to perform or attend by proper authority or dissuade any person from enlistment or accepting a commission in the national guard or naval militia by threat of injury to him in respect to his employment, trade or business in case his enlistment of state, discharge of employee or dissuading him from enlistment or accepting commission.

Section 2: No employer or officer or agent of any corporation, company or firm, or other person shall discharge any person from employment because of being or performing his duty as an officer or enlisted man of the military or naval forces of this state, or hinder or prevent him from performing any military service or from attending any military encampment or place of drill or instruction, he may be called upon to perform or attend by proper authority or dissuade any person from enlistment or accepting a commission in the national guard or naval militia by threat of injury to him in respect to his employment, trade or business in case his enlistment of a commission. (CL'48, §32.273)

This statutory enactment has not been repealed in the State of Michigan, either expressly or by implication. The statutes apply to employees in State Civil Service, if not, the statutory language would have excluded them. The Michigan Constitution did not exclude Civil Service employees from the protection of the statutory language, if so, there would have been a specific statement that Civil Service military personnel or veterans have no rights under the law of the State of Michigan. The Legislature did not see fit to make that assertion nor should a court.

The next statute of Michigan that applies in this case is the *"Preference in Employment Act"*, Act 205 of 1897, page 264, effective August 30, 1897, as amended by the Public Acts of 1944, being M.S.A. 4.1221, et seq.

M.S.A. 4.1222, states specifically, as follows:

"No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries as indicated in the preceding section holding an office or employment in any public department or public works of the state or any county, city or township, or village of the state, except

heads of departments, members of commissions, and boards and heads of institutions, appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official conduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, *except after a full hearing before the* governor of the state if a state employee. . . . .".

The petitioner was a state employee. He was dismissed from his job, without a hearing before the Governor, even though he requested it, and, that request was ignored.

During the proceedings, an attempt was made to discipline Lt. Colonel Baumont with the military. He was exonerated of any wrongdoing on August 9, 1973. (Appendix B, P) Page 3 of decision of Michigan Court of Appeals.

It is to this cavalier disregard of the statutes of Michigan and the refusal of the State Courts of Michigan to answer the petitioner's questions that this petition is directed.

REASONS FOR GRANTING THE WRIT

1. THE QUESTION OF WHETHER OR NOT A STATE CIVIL SERVICE EMPLOYEE OF MICHIGAN, WHO IS ALSO A MEMBER OF THE UNITED STATES ARMY RESERVE AND A VETERAN, IS ENTITLED TO THE PROTECTION OF THE VETERANS PREFERENCE IN EMPLOYMENT ACT IN MICHIGAN, AS WELL AS THE OTHER ACTS HERETOFORE MENTIONED, IS OF PARAMOUNT IMPORTANCE TO CIVIL SERVICE EMPLOYEES OF MICHIGAN. IT IS OF EQUAL IMPORTANCE TO THEM TO KNOW WHETHER OR NOT THE COURTS OF MICHIGAN ARE ACTUALLY REQUIRED TO ENFORCE ITS OWN LAWS.

The Preference in Employment Act for Veterans, Act 205 of 1897, effective August 30, 1897, as amended, states:

"No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries as indicated in the preceding section holding an office or employment in any public department or public works of the state or any county, city or township or village of the state, except heads of departments, members of commissions, and boards and heads of institutions, appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, *except after a full hearing before the governor of the state if a state employee*. . . .".

The petitioner has consistently claimed that he was entitled to a hearing before the Governor of the State of Michigan, in accordance with the provisions of the Veterans Preference in Employment Act, M.S.A. 4.1221, et seq. He has been denied one. No court charged with the responsibility of interpreting the laws of the State of Michigan, has ruled or advised him why he was not entitled to the protection of the state statutes referred to above. If the petitioner cannot request the judiciary to answer his question, where can he turn? If the Governor of Michigan refuses to conduct a hearing and the courts of Michigan absolutely refuse to discuss the issue, the petitioner contends that he has been deprived of due process of law.

State law granted petitioner a right, that is, a hearing before the Governor in conformity with the Veterans Preference Act aforesaid. That hearing was denied. Petitioner had a right to a full, fair hearing before the Governor before he could be removed from his position in state government.

Furthermore, in M.S.A. 4.1486(4), it is stated:

> "Any public employee who holds a position in a public employment *shall be granted* a leave of absence for the purpose of being inducted or otherwise entering military duty. If not accepted for such duty, the employee shall be reinstated to his position without loss of seniority or status or reduction in his rate of pay".

In this case, the petitioner was called to active duty with the United States Army Reserve. He was required to follow the Federal order! If he had refused, he could have been disciplined by the Army. However, in following federal orders, which are supreme to that of any state law, he was fired upon his return on November 20, 1972. The state contends that he was removed for other reasons, which the petitioner contends are untrue. The complaint lodged against the petitioner was that he was on military leave from October 24, 1972 through November 17, 1972 and that he failed to notify his supervisor that he would be on military leave for that period of time. (DOL Exhibit #1)

However, it was stated by his employer at his hearing, "It is clear by the procedures that for military leave purposes, employees do not need the approval of their supervisor". (R 79 and 81)

Furthermore, M.S.A. 1486 (3) states:

> "Any person who is restored to a position, in accordance with the provisions of this act shall not be discharged from such position *without cause within one year after such restoration*. . . .".

The petitioner did nothing wrong within the one year period after he returned from military leave because he was fired on the very day that he returned, that is, November 20, 1972.

2. THE PETITIONER WAS DEPRIVED OF THE PROTECTION OF ARTICLE V AND XIV OF THE UNITED STATES CONSTITUTION BY THE STATE COURTS OF MICHIGAN WHICH ABSOLUTELY REFUSED TO ADJUDICATE WHETHER OR NOT THE PETITIONER WAS ENTITLED TO THE PROTECTION OF THE ACTS LISTED IN QUESTION NUMBER ONE (1), ESPECIALLY IN VIEW OF THE FACT THAT THE PETITIONER WAS REQUIRED TO REPORT FOR DUTY BY A FEDERAL ORDER AND WAS EXONERATED OF ANY WRONGDOING BY THE UNITED STATES ARMY.

On July 28, 1868, the Fourteenth Amendment was adopted to make more meaningful the rights and privileges of all American citizens. As an American citizen, therefore, one has two principal sources of protection against any violation of basic individual rights. One is the Constitution and laws of a state. The other is the Constitution and laws of the United States. In the years since the adoption of the Constitution and the Amendments, which were designed to control the activities of the national government, those ten amendments, plus the Fourteenth Amendment, have been used to control

the actions of State Governments. The federal government has become the government of last resort for persons asserting their civil rights and liberties.

The appellate courts of Michigan have absolutely refused to adjudicate whether or not petitioner is entitled to the protection of the Acts aforesaid, that is, "state action" within the meaning of the Fourteenth Amendment. In *Ex Parte Virginia*, 100 US 339, p 346, the court stated:

> "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

The petitioner, because he was not accorded a full hearing before the Governor of Michigan, contends that he was denied due process of law and the equal protection of the law under the Fourteenth Amendment to the United States Constitution.

In *Brouwer* v *Kent County Clerk*, 377 Mich 616, p 644, the court referred to *Ex Parte Virginia*, supra, as follows:

> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v *Rives*, 100 US 313 (25L ed 667); *Pennsylvania* v *Board of Directors of City Trusts of Philadelphia*, 353 US 230 (77S Ct 806, 1 L ed 2d 792); *Shelley* v *Kraemer*, 334 US 1 (68 S Ct 836, 92 L ed 1161, 2 ALR2d 441), or whatever the guise in which it is taken, see *Derrington* v *Plummer* (CA5), 240 F2d 922; *Department of Conservation & Development, Commonwealth of Virginia* v *Tate*, (CA4), 231 F2d 615. *Cooper* v *Aaron* (1958), 358 US 1, 16, 17 (78 S Ct 1401, 3 L ed 2d 5, 19)."

The court stated further:

> "For example, in *Southern R. Co.* v *Greene* (1910), 216 US 400 (30 S Ct 287, 54 L ed 536), the United States Supreme Court stated the requirements of the equality clause this way, at p 412:
>
> " 'The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to hear the same burdens as are imposed upon, other persons in a like situation.' " (p 641)

Also, on page 646 of the opinion, the court stated:

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said

generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances."

In view of this language, how can the State of Michigan deprive State Civil Service employees, who are coincidentally in the United States military, of the protection of the Acts aforesaid in the same manner as other citizens who are not Civil Service employees?

What does the Fourteenth Amendment mean when it requires "due process of law", and, "equal protection of the law"? Are these two concepts mutually exclusive? Are they separate and distinct philosophical legal concepts?

The answer is, the clauses should be construed together. In *Vernon* v *The State*, 245 Ala. 633, p 635, it is stated:

"[1,2] Procedural due process, broadly speaking, contemplates the rudimentary requirements of fair play, which include a fair and open hearing before a legally constituted court or other authority, with notice and opportunity to present evidence and argument, representation by counsel, if desired, and information as to the claims of the opposing party, with reasonable opportunity to controvert them. *Garret* v *Reid*, 244 Ala. 254, 13 So.2d 97; *Shields* v *Utah Idaho Cent. R. Co.*, 305 US 177, 59 S.Ct. 160, 93 L.Ed. 111; *Morgan* v *United States*, 304 US 1, 58 S.Ct. 773, 83 L.Ed 1129, 42 Am. Jur. 379; *Frahn* v *Gregling Realization Corp.*, 239 Ala. 580, 195 So. 758; *Almon* v *Morgan County*, Ala. Sup., 16 So. 2d 511.

"And in *Barrington* v *Barrington*, 206 Ala. 192, 89 So. 512, 513, 17 A.L.R. 789, it was said: 'Due process of law guaranteed by the federal Constitution has been defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. *Caldwell* v *Texas*, 137 US 692, 11 S. Ct. 224, 34 L.Ed. 816; *Leeper* v *Texas*, 139 US 462, 11 S. Ct. 577, 35 L.Ed 225.' "

In the instant case, the petitioner maintains that due process of law required a full hearing before the Governor of the State of Michigan, prior to the time that he was removed from State employment on November 20, 1972, in accordance with the Veterans Preference in Employment Act, supra. Certainly, the equal protection clause construed with the due process clause contemplates that one has access to the courts for relief, free from the "orders of the government", that deprive petitioner of the protection of the law. The "order of government" was the refusal of the appellate courts to answer petitioner's question, was he entitled to the protection of the Acts aforesaid, and the Veterans Preference in Employment Act, supra?

State, County, City, Township or Village employees are entitled to the protection of the Veterans Preference in Employment Act, supra. The method for their removal is clearly set forth in the statutory provisions. Is it not true that a State employee is entitled to the same protection, especially in view of the fact that the Act specifically refers to State employees?

The petitioner cannot comprehend why he was not entitled to the same protection of the Act, as well as the other Acts, as any other citizen before being removed from his job with the State of Michigan. What rational classification can be made that excludes State employees from the protections of the Act aforesaid? Certainly, if it is stated that public employees are not entitled to the protection of the Act aforesaid, it is an unreasonable and arbitrary classification.

In the document entitled, "Statement of Support for the Guard and Reserve," (Appendix D, P), it was the avowed policy of the State of Michigan to protect the job and career opportunities of State employees, who, coincidentally

serve in the National Guard of Reserve forces of the United States! Why then, has every governmental unit of Michigan, ignored the legislative mandate, and this policy statement including the Governor, who adopted it, that is, "Our employees job and career opportunities will not be limited or reduced by their service in the Guard or Reserve"? But that's exactly what happened to the petitioner when he returned from military duty on November 20, 1972!

In the Fourteenth Amendment by Brannon, it is stated, on page 320, as follows:

> "Justice Field, in the opinion of *Barber* v *Connolly* (113 US 27), said the Fourteeenth Amendment in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws', undoubtedly meant, not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all alike under like circumstances in the enjoyment of their personal and civil rights, that all persons should be entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one man than are laid upon others in the same calling and condition; . . . ."

In the instant case, the petitioner was denied "access to the courts" because the appellate courts of Michigan refused to address themselves to the problem that he raised under the statutes alluded to aforesaid. How, then, was his right to enjoy his property "equally protected"? The word "protected" or "protection", certainly must encompass the right to be heard in court or to at least have the court answer his question. However, when the petitioner attempted to exercise his rights in Michigan, granted to him by the Legislature by the adoption of the three state statutes aforesaid, he was deprived of their protection by the power of the State of Michigan, that is, its judicial branch of government which absolutely refused and failed to discuss the issues that he raised. This is his grievance, and a just one at that!

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted, so that the decision of the Supreme Court of Michigan be reversed and petitioner granted a hearing before its Governor.

Respectfully submitted,

WLM

DATED: March , 1979.

EXHIBIT "A"

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF INGHAM

ROBERT A. BEAUMONT,
Plaintiff,

-vs- No. 73-16070-AV

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,
Defendants.

ORDER AFFIRMING DECISION OF CIVIL SERVICE COMMISSION

At a session of said Court held in the City of Lansing, County of Ingham, on September 29, 1976

PRESENT: Honorable James T. Kallman, Circuit Judge

WHEREAS the appeal of Robert A. Beaumont from a decision of the Civil Service Commission affirming his dismissal from employment by his appointing authority the Michigan Department of Labor has been argued and briefed by counsel for the respective parties, and the Court being fully advised in the premises, and in accordance with the opinion of the Court issued on September 8, 1976;

IT IS HEREBY ORDERED AND ADJUDGED that the decision of the Civil Service Commission be and the same hereby is affirmed.

(s) JAMES T. KALLMAN
Circuit Judge

(s) WILLIAM L. MACKAY
Attorney for Robert A. Beaumont

APPROVED AS TO FORM ONLY WPM WM

(s) FELIX E. LEAGUE (P16481)
Assistant Attorney General
Attorney for Department of Labor
and Civil Service Commission

EXHIBIT "B"

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT A. BEAUMONT,
Plaintiff-Appellant,

-vs- Docket #30559

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,
Defendants-Appellees.

BEFORE: V. J. Brennan, P.J., and D. E. Holbrook and Martin, JJ. PER CURIAM

Plaintiff Robert A. Beaumont appeals the decision of Judge James T. Kallman in Ingham County Circuit Court on September 8, 1976, affirming the Civil Service Commission in upholding the decision of November 20, 1972 to dismiss plaintiff from his position as Labor Safety Supervisor in the Bureau of Safety and Regulation of the Michigan Department of Labor. Plaintiff appeals as of right, pursuant to GCR 1963, 806.1.

The facts of this case, being complicated, require brief restatement. On September 6, 1972, plaintiff was advised by memorandum that an evaluation report submitted June 15, 1972 indicated the performance of his work unit, known as Safety Services West, was significantly inferior to that of Safety Services East. He was advised to take appropriate remedial action. This memorandum also charged that plaintiff had refused to utilize rating criteria developed by his immediate supervisor in evaluating the performance of new employees and had rather applied his own standards.

When budget cuts in 1972 forced a limitation to the number of employees attending the annual meetings of the National Safety Congress in Chicago, plaintiff was informed he had not been selected to attend. His appeals for reconsideration were rejected, and he was told that if he wished to attend the meetings he would have to do so at his own expense. He was informed at this time that arrangements for annual leave should be made with his immediate supervisor. This information was communicated to plaintiff by memorandum on or about October 19, 1972.

During the week prior to October 21, 1972, plaintiff advised his secretary that he was leaving on October 21, 1972 and would be gone for one month. He stated he would return on November 20, 1972 and would leave again for Thanksgiving, taking off the Friday following Thanksgiving as annual leave time. This absence was to be followed by a week of military leave. He also advised his secretary not to tell anyone of his intended absences.

Plaintiff's immediate supervisor, Albert L. Osborn, first learned that plaintiff would be absent during the week commencing on October 22, 1972. His source of information concerning this absence was an itinerary for that week submitted to Mr. Osborn's secretary by plaintiff on Friday, October 20, 1972. Notice of plaintiff's absence in the succeeding weeks was given by itinerary's delivered by plaintiff's wife to Mr. Osborn's secretary each Friday. Plaintiff had previously given Mr. Osborn advance notice when taking military leave.

Some confusion in the record exists as to the written orders under which plaintiff went on military duty during the time in question. A copy of the orders indicated that he had been ordered to report to Chicago to attend the National Safety Council. Copies of the orders submitted to the Department of Labor and introduced as plaintiff's exhibit omitted the portion of the order which required his attendance at the Chicago conference. Plaintiff admitted altering the orders, but said he did so only because his military assign-

ments were secret and the Department of Labor was entitled only to that portion of the orders which established the dates with respect to which he was on military duty.

However, Lieutenant-Colonel W. T. Prescott, officer in charge of signing plaintiff's orders, advised the Department of Labor that contrary to plaintiff's testimony no question of secrecy attached to the military operations in which plaintiff was engaged.

On November 20, 1972, plaintiff was dismissed from his position with the Department of Labor. Appeal from his dismissal was rejected following hearings before Department of Civil Service Hearing Officer Orland Ellis on April 6, 1973. Hearing Officer Ellis also rejected plaintiff's appeal from the Department of Labor's refusal to pay for military leave during his absence from October 30, 1972 to November 3, 1972.

On August 9, 1973, plaintiff was cleared of charges that he violated Army policy in the manner in which he took his leave.

On August 16, 1973, plaintiff obtained reversal of a decision of the Michigan Employment Security Commission denying his unemployment compensation, due to the fact the Commission had not properly found misconduct on plaintiff's party by a preponderance of the evidence.

On October 2, 1973, following a meeting of September 18, 1973, the Civil Service Commission affirmed Hearing Officer Orland Ellis' original decision to affirm plaintiff's dismissal. On November 30, 1973, plaintiff petitioned the Ingham County Circuit Court for a review of the Civil Service Commission ruling. While this matter was pending, action by Ingham County Circuit Judge Donald L. Reisig in a separate matter involving unemployment compensation held invalid a department regulation under which plaintiff had been disciplined for speaking out publicly in opposition to departmental policy.

Shortly afterward, on October 18, 1974, plaintiff moved to have the instant case remanded to the Civil Service Commission for incorporation into the record of information from the hearing and opinion held before Judge Reisig on the invalid departmental regulation.

On March 11, 1975, an order was filed by Judge Kallman remanding the case to the Civil Service Commission to "take testimony along the lines set forth in the Motion," and to "determine its materiality," to decide "whether or not it was considered or not [sic] in the situation" and "then bring it up on the rest of the record."

Following a June 30, 1975 hearing before Hearing Officer Peter Jason, a grievance decision was released on December 30, 1975 which found that plaintiff's clean record prior to November 20, 1972 had not been considered either by the initial hearing officer or the Civil Service Commission due to the timing of the various decisions and that consequently plaintiff had not been evaluated as a first-time offender.

On September 8, 1976, Judge Kallman affirmed the Civil Service Commission in an opinion which sustained the original decision to dismiss plaintiff. Plaintiff appeals to us from that decision.

Defendant raises several allegations of error, we will discuss only one at length.

We must determine whether Judge Kallman, in affirming plaintiff's dismissal of November 20, 1972, committed error in failing to eliminate from consideration the possibility that the severity of that penalty may have been directly affected by notation of disciplinary action taken under a departmental regulation later declared invalid and expunged from plaintiff's record.

In addressing this question, the trial court stated:

> "It should be noted here that the Hearing Officer on remand from this Court found that the freedom of speech

issue heard by Judge Reisig was not material to the issue of dismissal. That finding is supported by the record. The freedom of speech issue dealt with a directive of the Department of Labor that Mr. Beaumont *cease and desist from holding press conferences and discussing policy matters with governmental representatives*. The decision by Judge Reisig which was favorable to the Plaintiff did not deal with discussion and criticism of superiors with department employees. There is nothing in the record to indicate that the freedom of speech issue played any part in the Plaintiff's dismissal." (Emphasis added).

On remand, Hearing Officer Peter Jason considered the impact of Judge Reisig's decision on the instant case and stated:

> "Considering first Judge Reisig's opinion: Mr. Brown who was then the Director of the State Department of Labor issued an order that the Grievant alleged impinged upon his rights of freedom of speech. Judge Reisig in his decision found that under the State Constitution the Civil Service Commission was the proper agency to establish rules and regulations governing state employees' behavior. Consequently, Mr. Brown had no authority to promulgate the rule, thus the discipline was improper. *The Judge did not decide, however, that the rule did or did not improperly impinge upon Grievant's* first amendment rights. Since there has been no attack by the Grievant anywhere in this matter that the rules that he has been found to have violated were promulgated in an improper fashion, I find that the opinion of Judge Reisig on the freedom of speech issue is not directly relevant or material to this matter." (Emphasis added).

A review of Judge Reisig's opinion convinces us that Jason was correct in his assessment of that opinion. Judge Reisig stated:

> "No matter how reasonable Mr. Brown's directive might have been, since it regulated condition of employment and tended to chill the employee's First Amendment rights of free speech, it was in contravention, as I've already indicated, of Article 11, Section 5, paragraph 4 of the State Constitution. Only the civil service commission had the power to pass such a rule or regulation. If such a rule or regulation had been passed by the civil service commission, then Brown would have had the power to enforce that regulation and the issue would then be squarely before this court as to whether or not that regulation is a valid impingement upon the employee's rights or is a valid protection of the governmental interests."

The paragraph of the State Constitution to which Judge Reisig refers provides:

> "The [Civil Service] Commission shall classify all positions in the classified service according to their respective duties and responsibilities* * * *make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.*" Const 1963, art 11, §5. (Emphasis added).

The decision to dismiss in this case did not directly consider the free speech question raised by plaintiff in the matter Judge Reisig decided. On the contrary, dismissal of plaintiff from his job in the instant case was grounded on charges that:

> "The person named above took off for a month of military duty without approval of his supervisor and without any conversation with his supervisor.
>
> "He made no plans for the continuation of the training of a new employee while he is gone.
>
> "He made no plans for the supervision of his field personnel while he is gone."

Plaintiff was also charged with being critical of his supervisor and communicating this criticism to his personnel to

the detriment of the morale and effectiveness of the Board of Safety Regulations.

On this matter, Hearing Officer Ellis stated:

> "The Hearing Officer finds that as a matter of fact that Mr. Beaumont discussed with subordinate field employees departmental problems and also that he criticized his supervisor to these field employees. This conduct is contrary, not only to departmental policy, but to good standards of conduct in public or private employment." (Emphasis added.)

Plaintiff was given a full and proper hearing on each of these charges. His claim on appeal that the disciplinary action regarding the invalid regulation affected his dismissal has been held unfounded as a matter of fact by Hearing Officer Jason on rehearing and affirmed as legally correct by Judge Kallman on appeal. We accept Hearing Officer Jasons finding of fact on appeal and further perceive no legal error in these proceedings or Judge Kallman's review of these proceedings. Thus, concerning the improper consideration of the invalid regulation in the present dismissal, we affirm the holdings below.

Having reviewed plaintiff's other allegations of error, we find non substantial enough to merit lengthy comment or to reverse on.

Affirmed.

EXHIBIT "C"

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 17th day of January in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 23-429

ROBERT A. BEAUMONT,
Plaintiff-Appellant,

-vs-

61657 COA: 30558
LC:73-16070-AV

MICHIGAN DEPARTMENT OF LABOR and MICHIGAN CIVIL SERVICE COMMISSION,
Defendants-Appellees.

On order of the Court, the appplication for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true

and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 17th day of January in the year of our Lord one thousand nine hundred and seventy-nine.

(s) Corbin R. Davis, *Deputy Clerk*

EXHIBIT "D"

STATEMENT OF SUPPORT FOR THE GUARD AND RESERVE

We recognize the National Guard and Reserve as essential to the strength of our nation and the maintenance of world peace. They require and deserve the interest and support of the American business community, as well as every segment of our society.

In the highest American tradition, these Guard and Reserve forces are manned by civilians. Their voluntary service takes them from their homes, their families and their occupations. On weekends, and at other times, they train to prepare themselves to answer their country's call to active service in the United States armed forces.

If these volunteer forces are to continue to serve our nation, a broader public understanding is required of the total force concept of national security—and the essential role of the Guard and Reserve within it.

The Guard and Reserve need the patriotic cooperation of American employers in facilitating the participation of their eligible employees in Guard and Reserve programs, without impediment or penalty.

We therefore join members of the American business community in agreement that:

1. Our employees' job and career opportunities will not be limited or reduced because of their service in the Guard or Reserve;

2. Our employees will be granted leaves of absence for military training in the Guard or Reserve without sacrifice of vacation time; and

3. This agreement and the resultant policies will be made known throughout the organization and announced in publications and through other existing means of communication.

Secretary of Defense

Chairman
National Committee for Employer Support
of the Guard and Reserve

Governor
State of Michigan

EXHIBIT "E"

1900 Willowbrook Drive
Lansing, Michigan 48917
January 15, 1973

Hon. William G. Milliken, Governor
STATE OF MICHIGAN
State Capital
Lansing, Michigan 48902

Dear Governor Milliken:

I am a reserve officer of the United States Army Reserve and an 8+ year employee of the Michigan Department of Labor who, upon my release from active duty on November 20, 1972, was summarily discharged!

And under the protections provided by State law (see copy of Act #205, 1897 as amended by Act #179, PA 1959—attachment pages #25 & #26 . . .) I herewith respectfully request (1) immediate reinstatement to my job, with full back pay and allowances, and (2) the FULL HEARING BEFORE THE GOVERNOR that this law provides.

Also we are advised by the Federal government (see attached letter of January 3, 1973 . . .) that this summary dismissal also violates Acts #263, PA 1951, #133, PA 1955 of the State of Michigan and the Federal acts—all of these laws enacted by the people to protect the veteran/reservist who serves his (our!) country. (Copies of these Acts are attached—pp 17-24 . . .)

Please know that this illegal action has caused great suffering and sorrow to my family and myself—including the irrevocable loss (death) of a dear one.

We look forward to the reliefs available thru your good offices, Governor . . .

Respectfully,

(s) Robert A. Beaumont, C.S.P.
Supervisor, Safety Services
Department of Labor

Lieutenant Colonel, Ordnance Corps
United States Army Reserve

Attachments:
Dismissal File—including Veterans preference/ reemployment Acts
January 3, 1973 letter of the United States Department of Labor

EXHIBIT "F"

(Department of Labor Letterhead)

January 26, 1973

Mr. Robert A. Beaumont
1900 Willowbrook Drive
Lansing, MI 48917

Dear Mr. Beaumont:

Your letter of January 15, 1973, to Governor William G. Milliken has been referred to me for response.

Classified Civil Service employees in the state service are not subject to the legislation to which you refer in your letter.

The Constitution of the State of Michigan takes precedence over such legislation and is controlling on all matters of employment affecting classified state employees.

Article XI, section 5 of the Constitution of the State of Michigan charges the Michigan Civil Service Commission with exclusive responsibility and authority to regulate all conditions of employment affecting classified Civil Service Employees.

The interpretation of these constitutional provisions has been affirmed in a number of Attorney General Opinions, the most recent of which being Opinion No. 4709, dated September 4, 1970, signed by Attorney General Frank J. Kelly.

The matter of your dismissal has been scheduled for a full hearing before a Civil Service Hearing Officer on January 31, 1973. This Civil Service hearing is the proper legal process through which classified state employees present grievances and seek such relief as you request in your letter to Governor Milliken.

Very truly yours,

Barry Brown

cc: Governor William G. Milliken
Sidney Singer, State Personnel Director
Members of the Civil Service Commission

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1564

ROBERT A. BEAUMONT,

Petitioner,

-vs-

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Business Address:
525 West Ottawa Street
761 Law Building
Lansing, Michigan 48913
(517) 373-1124

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IN THE
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October Term, 1978

No. 78-1564

ROBERT A. BEAUMONT,

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-vs-

MICHIGAN DEPARTMENT OF LABOR and
MICHIGAN CIVIL SERVICE COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

In addition to the orders and decisions set forth in petitioner's Appendix, Respondents believe that the court should have before it for consideration the following orders and opinions:

a. Opinion and decision of Hearing Officer Orland Ellis (Respondents' Appendix 1b).

b. Opinion of the Honorable James T. Kallman, Circuit Judge (Respondents' Appendix 10b).

JURISDICTION

Respondents respectfully submit that this Court lacks jurisdiction to issue a writ of certiorari in this case. 28 USC § 1257(3) gives this Court jurisdiction to review final decisions of state courts by way of certiorari (1) where the validity of a federal treaty or statute is drawn in question; (2) where the validity of a state statute is drawn in question on the ground of its being repugnant to federal law; and (3) where a title, right, privilege, or immunity is set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States. In the instant case, no challenge was placed to the validity of any federal treaty or statute; neither party contended that any state statute was invalid on the ground that it was repugnant to federal law; and no sufficient challenge or contention was made that any of the rights, privileges, or immunities of Petitioner under the constitution, treaties or statutes of the United States were violated, or in any event, the question has not been properly raised by the petition for certiorari filed in this cause. Petitioner's claim of a substantial federal question amounts to nothing more than the conclusory assertion that the state courts' interpretation of the applicability of certain state statutes deprived him of due process and equal protection. Such unsupported allegations, without more, are insufficient, *Bowe* v *Scott*, 233 US 658, 664-665 (1914), and merely involve questions of state law.

QUESTIONS PRESENTED

1. ASSUMING, *ARGUENDO*, THAT A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED, WAS PETITIONER DEPRIVED OF ANY MICHIGAN STATUTORY RIGHTS BY THE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS RESULTING IN THE AFFIRMANCE OF HIS SEPARATION FROM STATE EMPLOYMENT?

2. WAS PETITIONER DEPRIVED OF DUE PROCESS OR EQUAL PROTECTION OF THE LAWS IN CONNECTION WITH THE ADMINISTRATIVE AND JUDICIAL PROCEEDING RESULTING IN THE AFFIRMANCE OF HIS SEPARATION FROM STATE EMPLOYMENT?

STATUTORY PROVISIONS INVOLVED

Respondents submit that the following statutory provisions are involved in this case, the texts of which are included in Respondent's Appendix:

MCLA 32.271; MSA 1487(1): 20b

MCLA 35.351, 35.353; MSA 4.1486(1), 4.1486(3): 20b

MCLA 35.402; MSA 4.1222: 22b

MCLA 24.301-24.306; MSA 3.560(201)-3.560(206): 17b

STATEMENT OF THE CASE

Petitioner was separated from employment with the Michigan Department of Labor, Bureau of Safety and Regulation, on November 20, 1972. Following his separation from employment, Petitioner, a member of the classified civil service,

pursued his grievance rights under the rules and regulations of the Michigan Civil Service Commission. His discharge by his appointing authority was sustained at all levels of the grievance hearings and appeals procedures culminating in an affirmance of said discharge by the Civil Service Commission. An appeal was taken from the Commission's decision to the Circuit Court for the County of Ingham pursuant to the provisions of the Michigan Administrative Procedures Act, MCLA 24.301-24.306; MSA 3.560(201)-3.560(206).

Under the provisions of the Michigan Administrative Procedures Act, *supra,* the reviewing court does not conduct a trial *de novo* but rather reviews the record made below and enters a decision either affirming, modifying or reversing that decision. The Circuit Court for the County of Ingham and the Michigan Court of Appeals affirmed the discharge of the petitioner. The Supreme Court of the State of Michigan denied Petitioner's application for leave to appeal.

On January 15, 1973, more than 30 days after the date on which Petitioner was discharged from employment, he first requested a hearing before the Governor of the State of Michigan. (Petitioner's Exhibit E). Petitioner similarly contended that he was entitled to a hearing before the Governor at hearings before a Civil Service hearing officer conducted on January 31, 1973, February 2, 1973, March 1, 1973 and March 2, 1973. He further placed in issue at said hearings, the question of the applicability of MCLA 32.271; MSA 1487(1), MCLA 35.351; MSA 4.1486(1), MCLA 35.353; MSA 4.1486(3), MCLA 35.353; MSA 4.1486(3) and MCLA 35.402; MSA 4.1222 with reference to his discharge from State service. The hearing officer ruled that these statutes were not applicable. Further, the hearing officer found that the reason for the petitioner's discharge was not discrimination because of military service. Respondent's App 6b.

ARGUMENT

THIS CASE MERELY INVOLVES ONE INDIVIDUAL'S DISSATISFACTION WITH HIS DISCHARGE FROM STATE EMPLOYMENT AND THEREFORE PRESENTS NO IMPORTANT QUESTIONS WHICH MUST BE DECIDED BY THIS COURT SINCE THE DECISION BELOW IS CLEARLY CORRECT, IS NOT IN CONFLICT WITH OTHER DECISIONS OF THIS COURT AND THE RECORD REVEALS NO DEPRIVATION OF CONSTITUTIONAL RIGHTS.

A. The Allegations Of Violations Of State Statutory Rights Do Not Raise Issues Within This Court's Certiorari Jurisdiction Under 28 USC § 1257(3) And Are In Any Event Without Merit.

As noted in the "Jurisdiction" section of this brief, *supra,* Respondents submit that Petitioner's argument that his rights under Michigan statutes were violated does not raise any issue within this Court's certiorari jurisdiction under 28 USC § 1257(3). Even if such an issue is within this Court's jurisdiction, however, Petitioner's contentions are without merit because it is clear that the Michigan courts considered his contentions and properly rejected them, concluding that he was not entitled to a hearing before the governor and that the discharge from state employment did not violate any other state statutory rights.

Petitioner alleges violation of his rights under certain Michigan statutes but that contention is without merit since the Michigan constitutional provisions relating to the state civil service take precedence over such statutes and it is not alleged that state civil service procedures were violated in connection with Petitioner's separation from state employment. Michi-

gan Const 1963, art 11, § 5 gives the Civil Service Commission the power to:

> ". . . [C]lassify all positions in the *classified service* . . . determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, *make rules and regulations covering all personnel transactions. . . in the classified service.*" (emphasis added)

This provision of the Michigan Constitution provides for a Civil Service Commission with power to determine the procedure for the hiring, employment, and discipline of employees of the classified civil service. In referring to the scope of the Commission's authority, the Michigan Supreme Court has said:

> "The Civil Service Commission is a constitutional body possessing plenary power. . . ." *Viculin* v *Department of Civil Service,* 386 Mich 375, 393; 192 NW2d 449 (1971)

See also *Groehn* v *Corporation and Securities Commission,* 350 Mich 250; 86 NW2d 291 (1975) and *Plec* v *Liquor Control Commission,* 322 Mich 691; 34 NW2d 524 (1948), which, while decided prior to the adoption of Mich Const 1963, interpreted the similar provision of Mich Const 1908, art 6 § 22.

The Michigan Constitution further provides in art 4, § 48 that:

> "The legislature may enact laws providing for the resolution of disputes concerning public employees, *except those in the state classified civil service.*" (emphasis added)

As a result of these provisions, control over members of the classified civil service such as petitioner, was preempted by the Civil Service Commission.

Petitioner contends that he is entitled to a hearing before the Governor by virtue of the provisions of MCLA 35.402; MSA 4.1222. Assuming, *arguendo,*that a veteran who is discharged from a classified civil service position is entitled to such a hearing, Petitioner waived any such right by failing to file a written protest within 30 days from the date of his removal from state service, MCLA 35.402; MSA 4.1222. Petitioner was discharged on November 20, 1972; he first filed a written protest or request for a hearing before the Governor on January 15, 1973 (Petitioner's Exhibit E) and thus and an adequate independant State law basis exists for the decision below, precluding review by this Court.

MCLA 32.271, *supra,* simply provides that no person shall be discriminated against because of his membership in the military or naval forces of the State or the United States. Because Petitioner's discharge was for failure to inform his supervisor of his absence from work and not for the absence itself, it cannot seriously be contended that Petitioner was discriminated against because of his membership in the military. It is conceded that under the provisions of MCLA 35.351 *et seq,* supra, any public employee shall be granted a leave of absence for the purpose of being inducted or otherwise entering military duty. In the instant case, Petitioner made no request for any such leave, but instead, absented himself from his employment station without advising his appointing authority.

With regard to Petitioner's allegation that he was entitled to be restored to his position upon return from military service and could not thereafter be discharged from such position within one year after such restoration, it is to be noted that MCLA 35.353, *supra,* read in proper context, provides that a veteran who is restored to his position in public employment shall not be discharged from such position *without cause* within one year after such restoration period. Petitioner was separated

for cause as set forth in the decision of the hearing officer (Respondents' Appendix 2b).

Petitioner has alleged that the Civil Service Commission, the Circuit Court for the County of Ingham, the Michigan Court of Appeals and the Supreme Court of the State of Michigan failed to address the questions raised by the petitioner with reference to the statutes of the State of Michigan. This contention proceeds from either a lack of understanding of, or a refusal to consider, the applicable civil service rules and regulations and Michigan statutes governing administrative hearings, decisions and appeals.

In the grievance procedures established by the Civil Service Commission pursuant to the authority of Mich Const 1963, art 11, § 5, *supra*, the "trial" of any grievance is conducted before a hearing officer of the Civil Service Commission. At any such hearing the parties are afforded an opportunity to present testimony, introduce exhibits and advance arguments in support of their position. Appeals from decisions of Civil Service hearings officers are taken to the Civil Service Commission itself where the record below is reviewed and, at the discretion of the Commission, additional hearings may be conducted. Appeals from decisions of the Civil Service Commission are taken to the Circuit Courts under the provision of the Michigan Administrative Procedures Act, *supra*. The review provided for by said Act on appeal from a decision of the Civil Service Commission is in the nature of certiorari. Further appeals within the court system are governed by the statutes and court rules with reference to appeals generally.

From the above, it can be seen that since appeals to the courts from decisions of the Civil Service Commission do not entitle appellants to a trial *do novo*, the reviewing court must and does review the whole record made below and

bases its decision upon a consideration of the *whole* record. It is therefore respectfully submitted that, in the instant case, the reviewing courts considered all of the evidence and arguments presented at the hearings before the Civil Service hearing officer in arriving at their decisions. The contention that they did not is without merit.

B. Petitioner's Rights To Due Process And Equal Protection Of The Laws Were Not Violated In Any Of The Administrative Or Judicial Proceedings Below.

Although Respondents submit that any federal question as to alleged due process and equal protection violation was not sufficiently raised below, see "Jurisdiction" section, *supra*, even if such a question is properly presented here it is without merit. Petitioner argues that his right to due process and equal protection of the laws was somehow violated, not by the named Respondents herein, but by the state courts which, he alleges (Petition, p 10), refused to address his contention that he was entitled to certain rights under Michigan statutes. Assuming, *arguendo*, that Petitioner sufficiently raised the federal question in the administrative and judicial proceedings below, the fact that his separation from state employment was affirmed necessarily means that his contentions were conclusively rejected:

> "In the opinion of the state court there is no express mention of the constitutional grounds upon which the appellant asked a reversal of the order . . . and from this it is argued that the constitutional validity of the order was not determined, and therefore as to that matter the judgment is not *res judicata*. But the argument is not sound. The question of the constitutional validity of the order was distinctly presented by the appellant's position and necessarily was resolved against him by the judgment affirming the order. Omitting to mention

that question in the order did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it." *Grubb* v *Public Utilities Commission of Ohio*, 281 US 470, 477-478 (1930).

Petitioner's constitutional claims amount to nothing more than the self-serving assertion that certain state statutes apply to him. By rejecting his claims the administrative and judicial tribunals below interpreted the statutes differently and simply concluded that they were inapplicable to him. Petitioner was given a full and fair hearing and afforded every opportunity to present his case. As may occur during the course of any litigation, rulings were made which were adverse to the Petitioner's contentions but he seemingly fails to recognize that such adverse rulings with respect to the legal contentions advanced on his behalf did not constitute a denial of due process. Even if the rulings were erroneous, a judicial officer's failure to rule correctly with respect to an issue of law is not a denial of due process. See *Beck* v *Washington*, 369 US 541, 554-555 (1962).

Similarly, Petitioner's contention that he was denied equal protection of the laws is without merit. There has been absolutely no showing on the record that Petitioner was treated differently than any other state employee similarly situated. His claim, in effect, is not that the veteran's preference statutes of the state of Michigan were applied differently in his case from the manner in which they were applied to others, but that these statutes were erroneously applied by the administrative tribunals and the courts. It cannot be seriously contended that a court's interpretation and application of a statute in a manner contrary to that requested by a litigant constitutes a denial of the equal protection of the laws. In *Beck* v *Washington, supra*, 369 US at 554-555 the court rejected an equal protection challenge in which the Petitioner alleged that the state had singled him out for special treatment by denying him procedural safeguards allegedly afforded to others:

> "And even if we were to assume that Washington law requires such procedural safeguards, the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error . . .' Milwaukee Electric R. and Light Co v Wisconsin, 252 US 100, 106, 64 L Ed 476, 480, 40 S Ct 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

In *Bishop* v *Wood*, 426 US 341, 344-345 (1976) this court reiterated the principle that sufficiency of a claim of entitlement to a property interest in employment can only be decided by reference to state law. In the instant case Petitioner Beaumont has not alleged a due process right to any particular procedure, and such a claim would be meritless in light of the dispositive state court opinions rejecting the state statutory interpretation he espouses. This court's language in *Bishop* v *Wood, supra*, 426 US at 349-350 is applicable in the instant case:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. * * * The due process clause of the Fourteenth

Amendment is not a guarantee against incorrect or ill-advised personnel decisions." (Footnote omitted).

CONCLUSION

For the foregoing reasons it is requested that the petition for a writ of certiorari be denied.

Respectfully submitted,
FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Attorneys for Respondents

Business Address:
525 West Ottawa Street
761 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: May 11, 1979

APPENDIX

STATE OF MICHIGAN

(SEAL)

WILLIAM G. MILLIKEN, Governor
DEPARTMENT OF CIVIL SERVICE

Lewis Cass Building, Lansing, Michigan 48913
SIDNEY SINGER, State Personnel Director

Civil Service
Commission
David Pollack
Chairman
Ernest L. Brown
Ruth M. Robertson
Walter D. DeVries

APR 6, 1973

AN ADJUDICATION IN
THE MATTER
of
ROBERT BEAUMONT
and
DEPARTMENT OF LABOR

HB 25-73
G - Compensation
4 - Policy
Application
A - Discipline
11 - Misconduct

PRESENT

Hearing Officer:
Mr. Orland Ellis
Hearings Reporters:
Mrs. Hazel Bucher
Mrs. Linda Lundquist

APPEARANCES

Mr. Robert Beaumont, Appellant
Mr. Fred Lapinski, Director, Employee Relations, M.S.E.A.
Mr. Archie C. Fraser, Attorney, Representing M.S.E.A.
Mr. Clair Andrews, Witness
Mr. William Gutos, Witness

Department of Labor

Mr. Barry Brown, Director
Mr. Arthur Zink, Personnel Officer

Department of Civil Service

Mr. Jon McNeil, Personnel Officer

Hearings were held on January 31, 1973 in the Department of Civil Service Conference Room, on February 2, 1973 in the Department of Administration Conference Room and on March 1 and 2, 1973, in the Department of Administration Conference Room, in the Lewis Cass Building at 320 South Walnut Street, Lansing, Michigan.

First Grievance

This is an appeal by Mr. Robert Beaumont from the Department of Labor's refusal to pay military leave for his absence from October 30, 1972 through November 3, 1972.

According to the orders issued by the Department of the Army dated October 19, 1972, (Appellant's Exhibit No. 23 of

March 1, 1973), Mr. Beaumont was ordered to "active duty for training—less than 90 days for retirement points only". He was further ordered "to attend the NRA approved safety/training session sponsored by the National Safety Council. No pay, allowances or travel at government expense authorized."

It is Mr. Beaumont's contention that under the terms of the order that he was entitled, in accordance with the rules of the Civil Service Commission, Section 11.4, to an equivalent to the difference between the employee's military pay and his regular state salary for each day of absence from scheduled state employment. He likewise claims that denying him the pay differential is a violation of the Michigan Constitution and the Acts of the State of Michigan relating to the rights of members of the armed forces, being the 1963 Constitution of the State of Michigan; Act 205 of the Public Acts of 1897, as amended by Act 179 of the Public Acts of 1959; Michigan Statutes Annotated 4.1487(1) and Michigan Statutes Annotated 4.1486(1).

The Hearing Officer finds no violation of the rights granted the employee under the Constitution of the Laws of the State of Michigan or of the United States. It was not established by the evidence that the employee was discriminated against because of his service nor was he hindered or prevented from performing military service.

The remaining issue, then, in this matter, is whether under Rule 11.4 Mr. Beaumont was on "a temporary leave of absence for active duty training". It appears from the testimony to be without question that the Civil Service Commission in the past had treated these situations as not entitling the employee to the pay differential. (See "Changing Forms" dated June 29, 1964, Civil Service Commission Exhibit No. 1 of January 31, 1973.) Indeed, Mr. Beaumont testified that he had served several times without military pay and had not asked for state pay.

It is the opinion of the Hearing Officer that the best principle to determine the meaning of a rule is to use that construction which the parties have already placed on the language involved. The Civil Service Commission did not in the past regard military leave of this type as entitling the employee to the state pay differential and the employee himself concurred.

It is the opinion of the Hearing Officer that when an employee serves in the military without pay he is precluded from asking for pay from the State.

Mr. Beaumont's request for military leave pay is therefore denied.

Second Grievance

This grievance is an appeal from the dismissal of Mr. Robert Beaumont by the Department of labor on November 20, 1972 from his position as Labor Safety Supervisor 13. The grounds for his dismissal are contained in the rules of the Civil Service Commission, Section 32.1 A and 32.1 C.

The Hearing Officer conducted hearings on the matter of this separation (and related matters of military leave pay and adjournments) over a period of four (4) different days. In this matter there was a great deal of testimony offered and a total of 74 exhibits introduced by the Appellant. He testified in his own behalf for a period of one (1) day.

In a general way, there is little dispute between the Department of Labor and Mr. Beaumont in relation to what was done. The dispute arises from whether or not the employee is invading managerial functions, whether he is presenting valid opinion, whether he is operating to the detriment of the employer, failing to carry out his duties and obligations and failing to perform his functions.

Mr. Beaumont was dismissed by the Department of Labor for the reasons stated in the memorandum from the Director of the Board of Safety and Regulations to the Director of the Michigan Department of Labor dated November 20, 1972. The specifics of the employer's complaint was that while Mr. Beaumont was on military leave from October 24, 1972 through November 17, 1972 he failed to notify his supervisor that he would be on military leave for that period of time. It was also charged that he:

a. Failed to make arrangements with his supervisor to have his position covered and make arrangements for the supervision of his personnel.

b. Attended the meeting of the National Safety Congress in Chicago and failed to notify his supervisor of his whereabouts.

c. Failed to carry out the rating procedure that his supervisor had set up for new employees.

d. That the employee was critical of his supervisor and communicated this criticism to his personnel to the detriment of the morale and effectiveness of the Board of Safety and Regulations.

Mr. Beaumont, on the other hand, alleges that he followed past procedures in giving notice of his military leave, that he followed the rules in reference to informing the Bureau of Safety Regulations as to his dates of military leave and to his itinerary. Mr. Beaumont also takes the position that his criticism of any of the activities of his supervisor or of the Board were in the nature of legitimate critique and not detrimental to the good order of his employer's afairs. The employee further charges that any lack of communications between himself and his supervisor was the supervisor's fault

and not his, that the basis of his discharge was discrimination because of his military service prohibited by law, that the charges of his employer do not satisfy the requirements of the Civil Service Commission for separation and that he was not given proper counselling prior to his termination.

The testimony satisfies the Hearing Officer that there was no violation of the Constitution or of the Laws of the State of Michigan or of the Federal statutes in reference to the separation. The Hearing Officer finds that the reason for the separation was not discrimination because of military service.

A substaintial portion of the testimony produced by Mr. Beaumont relates to the quantitative analysis of the Safety Services East and Safety Services West which was used by the department in its considerations. The testimony leaves the Hearing Officer with no other conclusion other than that the Bureau of Safety and Regulations is not engaged in any "numbers games" but that a quantitative analysis is only one of the tools used by management. The Hearing Officer finds that it was used only as one of the tools and was not sole and exclusive reason for the separation of the employee. The contention that the quantitative analysis is destructive of the professional aspect of the position is not well taken. Professional people of all types are subject to time limits. The attorney must have his pleadings in court by a certain day. He must be ready for trial by a certain day. The accountant is confronted with deadlines of all kinds in connection with the preparation of income tax and related returns to both the Michigan and the United States Government. From the testimony it is clear that the quantitative analysis was not directed against Mr. Beaumont exclusively but that it was used by the Bureau in connection with other employee problems also.

There is a dispute as to what the employee did in reference to notifying the Bureau of his dates of absence for military leave and his itinerary. It is undisputed, however, that his employer was not notified until the Friday immediately preceding the week which he was to be absent in at least the first week of his military service and that he did not supply his itinerary before that date. A similar pattern ensued as to the remaining three (3) weeks of his service. It is true that the employer does not have the right to approve or disapprove military leave. Nevertheless, the employer should be notified.

It is undisputed that Mr. Beaumont failed to communicate directly with his supervisor in regard to these leaves and the Hearing Officer is satisfied that during this absence Mr. Beaumont failed to make proper provisions for the supervision of the unit. To this extent, he failed in his duties.

The contention by the employee that because of the nature of the work, the employees have continuing assignments, that they are self-starters and that they do not need supervision is not convincing.

The Hearing Officer finds that as a matter of fact that Mr. Beaumont discussed with subordinate field employees departmental problems and also that he criticized his supervisor to these field employees. This conduct is contrary, not only to departmental policy, but to good standards of conduct in public or private employment.

During the course of the hearing, Mr. Beaumont introduced a number of letters furnished to him by his field employees which, in effect, said they could not comply with the rating standards promulgated by Mr. Orsborn. These exhibits, in my opinion, were a refutation of what Mr. Beaumont stated orally. No other conclusion can be drawn from the letters other than Mr. Beaumont had solicited them from the field employees

and encouraged the criticisms. This in and of itself is unsatisfactory conduct.

In reference to the lack of communication which was charged to Mr. Beaumont's supervisor, I gather from the testimony that there has been a long-standing lack of communications, rapport or good will, whatever you wish to term it, between Mr. Orsborn and Mr. Beaumont. Mr. Fiordellis has talked with both of the parties about this matter and had stated that he wanted this type of conduct terminated. At least, to that extent, Mr. Beaumont was counselled in the matter. In this particular case, I find that lack of communications was something that was attributable to Mr. Beaumont and not to his supervisor.

Mr. Beaumont was further counselled in connection with potential promotion reports (See Department's Exhibits #10, 11 and 12). I, therefore, find that Mr. Beaumont's contention is without merit.

A letter from the Department of the Army dated February 26, 1973, with enclosures, was dispatched to the Hearing Officer on Wednesday, March 7, 1973, but was not received until Monday, March 10, 1973. However, I am of the opinion that the letter and enclosures should be admitted as an exhibit and it is so admitted.

Likewise, the Hearing Officer has carefully studied the Supplementary Brief of the Appellant dated March 22, 1973, and is admitting it into the record.

There is a discrepancy between the two (2) sets of orders attached to LTC Prescott's letter. One conforms to the copy submitted as Department's Exhibit 5. The other has a sentence added in Paragraph (c), "To attend the NRA approved marksmanship safety/training sessions sponsored by the National Safety Council."

Mr. Beaumont discusses this in Paragraph 10 of his Supplemental Brief. However, the argument is not convincing to the Hearing Officer. I wish to assure Mr. Beaumont that I have taken note of the phrasing in LTC Prescott's letter that there is "nothing at hand" to indicate Mr. Beaumont was involved in any significant duties of a classified nature. Also, I do not consider the Department's letter of March 7, 1973 to me as evidentiary in nature. I, too, do not find the summary of orders as germane.

From examination of the alteration of the orders, I conclude that there is no valid basis for the deletion of part of the order. From the testimony, I conclude that it was done for the purpose of keeping his employer from knowing his itinerary.

During the progress of the hearing, Mr. Beaumont offered to take a lie-detector test. Courts of law do not admit polygraps tests as evidence for two (2) reasons. The first is that it has never been satisfactorily demonstrated that the test is accurate. Second, it invades the prerogative of the trier of the facts. For these reasons, Mr. Beaumont's offer is rejected.

Decision

Based upon the preceding discussion and findings, I conclude that Mr. Beaumont's appeal is without merit and is dismissed. The Department of Labor was justified in terminating his employment under the laws of this State and the rules of the Civil Service Commission.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM

ROBERT A. BEAUMONT, Plaintiff, -vs- MICHIGAN DEPARTMENT OF LABOR and MICHIGAN CIVIL SERVICE COMMISSION, Defendants.	**OPINION** No. 73-16070-AV

Oral arguments in Plaintiff's appeal were heard on July 8, 1976. The Court having heard the arguments of counsel, read the briefs, reviewed the record, and further being fully advised in the premises makes the following determinations:

FACTS

This is an appeal from the Civil Service Commission which upheld a decision of the Department of Labor dismissing the Plaintiff as an employee of that Department. On November 20, 1972, the Plaintiff's employment as a Labor Safety Supervisor 13 was terminated. Subsequently a hearing on the matter was held by the Department of Civil Service. After the conclusion of that hearing and after a consideration of the record the Hearing Officer opined that the Plaintiff's appeal was without merit and that the Department was jusified in terminating his employment. Among the reasons given for upholding the decision of the Department of Labor were: that the separation was not because of military service; that the quantitative analysis of the performance of the east-west sectors was one reason but not the exclusive reason for the Plaintiff's dismissal; that the Plaintiff failed to notify his supervisors prior to his leaving for military duty; that he failed to provide for the supervision of his unit during his absence; that he discussed departmental problems and criticized his supervisor in the presence of field employees; that the communications problem with supervisors was attributable to the Plaintiff and that he was counselled in connection with potential promotion reports; and finally that certain portions of the Plaintiff's military orders were deliberately deleted for the purpose of keeping his employer from knowing his itinerary.

This matter found its way to this Court in the form of an appeal. On March 11, 1975, the case was remanded to the Civil Service Commission for the purpose of amplification of the record. A hearing was conducted and decision issued in which it was held that the opinion of then Judge Reisig on the freedom of speech issue was not directly relevant or material to this case; that information pertaining to the Plaintiff's unemployment compensation hearing was immaterial and irrelevant to this case; and that the exoneration of the Plaintiff by the Army was not relevant or material to this case.

The matter is now ready for determination by this Court. It should be emphasized that review is limited to the record below. It must be determined whether the decision below is supported by the record. Section 106 of the Administrative Procedures Act provides that the decision or order of any agency shall be set aside only if it (a) violates the constitution or a statute (b) is in excess of the statutory authority or jurisdiction of the agency, (c) was made upon unlawful procedure, (d) is not supported by competent, material and substantial evidence on the whole record, (e) represents an arbitrary abuse of discretion, or (f) is erroneous as a matter of law. Whether the Court might have reached a different decision if it had heard the case originally is immaterial.

ISSUE

Whether the findings of the Hearing Officer are supported by the record?

DISCUSSION AND FINDINGS

The Plaintiff averred in written and oral argument that his dismissal was because of his military service. There is nothing in the record to support such an assertion. In fact the Defendants agree that a public employee has the right to participate in military service when called upon by the Federal government to do so without the prior approval of a supervisor. The Plaintiff's problems and dismissal were a result of the manner in which he gave notice (or lack of it) in connection with leaving for military service. Dismissal was not the result of the Plaintiff's military service per se. The decision of the Hearing Officer that separation was not because of military service is supported by the record.

The finding that Plaintiff failed to notify his superior of impending military duty is closely related to the communications problem the two individuals were having. The Plaintiff submitted standard forms to the payroll department prior to leaving for military duty. He also submitted itineraries for the period that he would be absent. However there was no direct communication to his supervisor Mr. Orsborn. This was shortly after a direct order from Mr. Fiordellis that he wanted communications between the two men (TR 195). The Plaintiff was absent for four weeks yet he asserts that he had no knowledge that his absence would be that long because his orders came in from week to week. It is interesting that the Plaintiff would inform his secretary of the *possibility* that he would be gone for about a month (TR 96, 320) yet he failed to mention anything to his supervisor. In fact his secretary

was informed not to tell anyone of his whereabouts unless directly asked.

The fact that the Plaintiff failed to notify his supervisor after a direct order from above, and that he had knowledge of the possibility that he would be gone for a long period of time negates the fact that past procedure was complied with. In fact Plaintiff on previous occasions had given notice regarding military leave (TR 111). It is apparent that the finding that Plaintiff failed to give notice prior to military leave is supported by the record.

The communications problem is closely related to the finding that the Plaintiff failed to provide for the supervision of his unit during his absence. Once again Plaintiff had been under a direct order to communicate. The Plaintiff's argument is that the men in his unit were self-starters who needed a minimum of supervision and that if any problems did come up they could be handled by his supervisor Mr. Orsborn. When Orsborn checked with the Plaintiff's fieldmen he was told that they had no instructions and didn't know where the Plaintiff had gone. In light of the fact that the Plaintiff knew that he would possibly be gone for a long period of time some arrangement should have been made. The finding that Plaintiff failed to provide for supervision in his absence is supported by the record.

The record reflects that the Plaintiff discussed and cut down individuals in the department and undermined the department. The Plaintiff informed Mr. Luck, a trainee, to disregard rating factors set forth by Mr. Orsborn (TR 135). It appears that Plaintiff was obsessed with the abilities and performance of Mr. Orsborn and discussed this with a Mr. Cooper, an employee within the department (TR 157-158). A Mr. Schreiber testified that the Plaintiff was constantly downgrading Mr. Orsborn (TR 163) and that he was out to

get Orsborn (TR 166). It is obvious that the Plaintiff discussed and criticized his supervisor and his policies in the presence of other employees in the department.

It should be noted here that the Hearing Officer on remand from this Court found that the freedom of speech issue heard by Judge Reisig was not material to the issue of dismissal. That finding is supported by the record. The freedom of speech issue dealt with a directive of the Department of Labor that Mr. Beaumont cease and desist from holding press conferences and discussing policy matters with governmental representatives. The decision by Judge Reisig which was favorable to the Plaintiff did not deal with discussion and criticism of superiors with department employees. There is nothing in the record to indicate that the freedom of speech issue played any part in the Plaintiff's dismissal.

The Hearing Officer found that the quantitative analysis of the east-west sectors comparing the performance of the Plaintiff's men with that of the men in the east sector was only *one* reason for the Plaintiff's dismissal. The Plaintiff complains that the study was prejudicial because he had no input into the analysis, the geographic regions were disparate in size, and that a one month period which would have been favorable to his position was not included in the study. Mr. Lee Weber was assigned to work on the comparison study. He testified that the Plaintiff was not consulted because, "numbers are numbers" and department records were relied on for the study (TR 256). He emphasized that his assignment was to compare quantity not quality (TR 258). When Mr. Weber was recalled to the stand he testified that if the performance for the month of April, 1972, had not been included in the study (Plaintiff complains of the absence of this month in the comparison) there would have been only a 2% increase in the performance of the west sector.

The complaint of the disparity in geographical size is not really valid. Although the Plaintiff's men had to cover more territory in their work the men in the highly industrialized east sector had more companies to deal with. It is obvious that the geographical area in the west was balanced against the industrial concentration in the east to make the work loads as equal as possible.

The Hearing Officer recognized the fact that the study was only quantitative. However, the issues previously discussed (lack of notice, failure to provide for supervision, the communication problem, and the criticism of supervision) support the finding that the comparison study was not the sole reason for the Plaintiff's dismissal.

The findings of the MESC concerning the Plaintiff's unemployment compensation are not relevant because misconduct which would justify dismissal is not necessarily the same that would justify the denial of unemployment benefits. Also the exoneration of the Plaintiff by the Army is not relevant to the issues here because the inquiry the Army dealt with alleged violations of Army regulations and not with misconduct in state employment.

The Court takes issue with the finding of the original Hearing Officer that promotional ratings are a form of counseling and thus the Plaintiff had been counseled as to his shortcomings. There is nothing in the record of the original hearing to indicate that promotional ratings are a form of counseling. At the remand hearing, Mr. Riggs, the Director of the Evaluation Division in the Department of Civil Service, testified that there is not automatic tie-in between Promotional Potential Ratings and counseling (TR 28).

At the remand hearing Mr. John Fitch from the Bureau of Labor Relations, Department of Civil Service testified that

in public employment counseling is recognized as one step in progressive discipline. It takes two forms: verbal and written (TR 23). However, he testified that he had no knowledge of the procedure followed in the Department of Labor (TR 24). He was certain that all departments have a counseling procedure of one type or another (TR 25). The Plaintiff complains that he had no counseling which would have made him aware of his deficiencies. Unfortunately the Defendants have not adequately addressed this question. However, it appears from the record that the Plaintiff's dismissal was because of insubordination and lack of communication with his supervisor. In this regard in September of 1972 the Plaintiff, Mr. Orsborn and their superior Mr. Fiordellis met to discuss the problem. As a result of that meeting Mr. Fiordellis directed that the two men communicate (TR 195). Without more it would appear that the Plaintiff was counseled with regard to the communications problems on this occasion. Yet, as noted earlier, a few weeks later the Plaintiff left for military duty without notifying his superior.

DECISION

The record reflects a pattern of insubordination by the Plaintiff, contempt for his supervisor, and at times indifference to his job. The record supports the finding of the Hearing Officer. The decision appealed from is affirmed.

An Order may enter in conformity with this Opinion.

/s/ JAMES T. KALLMAN
James T. Kallman, Circuit Judge

September 8, 1976

MCLA 24.301; MSA 3.560(201): When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review, by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

MCLA 24.302; MSA 3.560(202): Judicial review of a final decision or order in a contested case shall be by any applicable special statutory review proceeding in any court specified by statute and in accordance with the general court rules. In the absence or inadequacy thereof, judicial review shall be by a petition for review in accordance with sections 103 to 105.

MCLA 24.303; MSA 3.560(203): (1) A petition for review shall be filed in the circuit court of the county where petitioner resides or has his principal place of business in this state, or in the circuit court for Ingham county.

(2) A petition for review shall contain a concise statement of:

(a) The nature of the proceedings as to which review is sought.

(b) The facts on which venue is based.

(c) The grounds on which relief is sought.

(d) The relief sought.

(3) The petitioner shall attach to the petition, as an exhibit, a copy of the agency decision or order of which review is sought.

MCLA 24.304; MSA 3.560(204): (1) A petition shall be filed in the court within 60 days after the date of mailing notice of the final decision or order of the agency, or if a rehearing before the agency is timely requested, within 60 days after delivery or mailing notice of the decision or order thereon. The filing of the petition does not stay enforcement of the agency action but the agency may grant, or the court may order, a stay upon appropriate terms.

(2) Within 60 days after service of the petition, or within such further time as the court allows, the agency shall transmit to the court the original or certified copy of the entire record of the proceedings, unless parties to the proceedings for judicial review stipulate that the record be shortened. A party unreasonably refusing to so stipulate may be taxed by the court for the additional costs. The court may permit subsequent corrections to the record.

(3) The review shall be conducted by the court within a jury and shall be confined to the record. In a case of alleged irregularity in procedure before the agency, not shown in the record, proof thereof may be taken by the court. The court, on request, shall hear oral arguments and receive written briefs.

MCLA 24.305; MSA 3.560(205): If timely application is made to the court for leave to present addition evidence, and it is shown to the satisfaction of the court that an inadequate record was made at the hearing before the agency or that the additional evidence is material, and that there

were good reasons for failing to record or present it in the proceeding before the agency, the court shall order the taking of additional evidence before the agency on such conditions as the court deems proper. The agency may modify its findings, decision or order because of the additional evidence and shall file with the court the additional evidence and any new findings, decision or order, which shall become part of the record.

MCLA 24.306; MSA 3.560(206): (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

MCLA 32.271; MSA 4.1487(1): No person shall discrminate against any officer or enlisted man of the military or naval forces of the state or of the United States because of his membership therein.

MCLA 35.351; MSA 4.1486(1): When used in this act—

(a) The term "public employee" means any person holding a position in public employment, both classified and unclassified.

(b) The term "public employment" means remunerative employment by the government of this state, or of any county, municipality, or other civil or political subdivision thereof, including any department, agency or instrumentality thereof.

(c) The term "public employer" means any government, department or agency mentioned in subsection (b) of this section employing a public employee in a position.

(d) The term "position" means employment, whether probationary or otherwise, held by a public employee at the time of entrance into military duty, but shall not include temporary or casual employment or an office filled by election, nor officers appointed for a fixed term.

(f) The term "military duty" means (1) training and service performed by an inductee, enlistee or reservist or any entrant into a temporary component of the armed forces of the United States, and (2) time spent in reporting for and returning from training and service, or if a rejection occurs, from the place of reporting therefor: Provided, That the time spent does not exceed the minimum time required by law for the inductee or not exceed 3 years for the first enlistment, or not exceed 3 years for the reservist after being recalled to active duty or as soon after the expiration of such 3 years as the

reservist is able to obtain orders relieving him from active duty: And provided further, That if the re-employment provision of the selective service act is amended to provide a period of other than 3 years, such a period provided by the selective service act shall apply.

MCLA 35.353; MSA 4.1486(3): Any person who is restored to a position in accordance with the provisions of this act shall not be discharged from such position without cause within 1 year after such restoration, unless all employees in the same classification with less seniority are first laid off and shall, without limiting other rights conferred by this or other sections, be considered as having been or furlough or leave of absence during his period of military duty. He shall be restored without loss of seniority, including, upon promotion or other advancement following completion of any period of employment required therefor, a seniority date in the advanced position which will place him ahead of all persons previously junior to him who advanced to the position during his absence in the armed forces. He shall also be entitled on reinstatement to participate in insurance (including pension plans and medical insurance) and other benefits dependent on length of employment to the same extent as if he had remained continuously at work; he shall have the option to continue during his term of military service payments which participation in the benefit would have required of him had he remained at work, and shall have the option upon reinstatement to make up and such contributions which were not made during the period of his military duty; the employer shall make on the employee's behalf any payments the employer would have made had the employee remained at work. He shall be protected against reduction in his seniority, status or pay during his employment except as such reduction may be made for all employees whose employment situations are similar.

Nothing in this section shall be construed as requiring the granting of more than a total of 6 years' credit towards retirement.

MCLA 35.402; MSA 4.1222: No veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries as indicated in the preceding section holding an office or employment in any public department or public works of the state or any county, city or township or village of the state, except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, except after a full hearing before the governor of the state if a state employee, or before the prosecuting attorney if a county employee, or before the major of any city or the president of any village, or before the commission of any such city or village operating under a commission form of government, if an employee of a city or village, or before the township board if a township employee, and at such hearing the veteran shall have the right to be present and be represented by counsel and defend himself against such charges: Provided further, That as a condition precedent to the removal, transfer, or suspension of such veteran, he shall be entitled to a notice in writing stating the cause or causes of removal, transfer, or suspension at least 15 days prior to the hearing above provided for, and such removal, suspension or transfer shall be made only upon written order of the governor,

the prosecuting attorney, the mayor, commission, or the township board: Provided, however, That where such veteran has been removed, transferred, or suspended other than in accordance with the provisions of this act, he shall file a written protest with the officer whose duty under the provisions of this act it is to make the removal, transfer, or suspension, within 30 days from the day such veteran is removed, transferred, or suspended; otherwise the veteran shall be deemed to have waived the benefits and privileges of this act: Provided, however, Said hearing shall be held within 30 days of filing such notice: Provided further, That the mayor of any city or the president of any village or the commission of any such city or village operating under a commission form of government may refer any protest where a veteran is removed, transferred, suspended or discharged, to the legal department of such city or village for a hearing. The legal department shall act as a fact finding body and shall have the power to examine witnesses, administer oaths and do all those things which the mayor could do hereunder: Provided further, That the findings shall be transmitted to the mayor in writing by the legal department, whereupon the mayor shall examine the transcript of the hearing and make a decision based on the transcript thereof: And provided further, That where such veteran has been reinstated to his employment upon the written order of the governor of the state if a state employee, the prosecuting attorney if a county employee, the mayor of any city or the president of any village or the commission of any such city or village operating under a commission form of government, or a township board if a township employee, or by an order of any court of competent jurisdiction, then such veteran shall be entitled to receive compensation for the time lost from date of such dismissal or suspension to the date of reinstatement at the same rate of pay received by him at the date of dismissal or suspension.